ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CA08-08

August 27, 2008

JOANN COOPER

APPELLANT

V.

COOPER CLINIC, P.A.,
DR. BRIAN H. RODGERS and
DR. DONALD P. SAMMS

APPELLEES

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[No. CV-2004-1225]

HON. JAMES O. COX, JUDGE

AFFIRMED

Appellant JoAnn Cooper brought a medical-malpractice action alleging that the appellees were negligent in failing to diagnose her tonsillar cancer. The Circuit Court of Sebastian County granted the appellees' motion for summary judgment, concluding that Cooper lacked standing to file the complaint. Cooper appeals from the order granting summary judgment. We affirm.

Cooper alleged that from September 15, 2002 to June 5, 2003, she received medical treatment for throat, ear, jaw, and tongue complaints from Drs. Brian Rodgers and/or Donald Samms of the Cooper Clinic. She alleged that these doctors diagnosed her with allergies. Subsequently, Cooper was referred by her dentist to an ear, nose, and throat specialist, who diagnosed her with tonsillar cancer. On June 26, 2003, Cooper underwent throat-cancer surgery followed by radiation therapy.

On September 15, 2004, Cooper filed a complaint against Drs. Rodgers and Samms, and the Cooper Clinic, alleging negligence. Drs. Rodgers and Samms and the Cooper Clinic subsequently filed a motion for summary judgment, arguing that because Cooper filed for bankruptcy on June 9, 2004, and did not list her medical-malpractice claim as one of her assets in the bankruptcy petition, she did not have standing to file the case against them. On September 12, 2007, the trial court entered a letter opinion and an order granting the motion for summary judgment and dismissing the case. Cooper filed a timely notice of appeal.

We set forth our standard of review of a trial court's order granting summary judgment in *Lewis v. Crelia*, 365 Ark. 330, 332, 229 S.W.3d 19, 20–21 (2006) (citations omitted), stating:

> Summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. The burden of sustaining a motion for summary judgment is the responsibility of the moving party. Once the moving party has established a prima facie entitlement to summary judgment, the non-moving party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered. We view the evidence in the light most favorable to the non-moving party, resolving all doubts and inferences against the moving party.

The law applicable to this case is found in *Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006), also a medical malpractice case with facts very similar to those in the case at bar. There, a partial default judgment was entered against a doctor in favor of one of his patients. The doctor moved to set aside the default judgment, and the patient filed a motion to substitute parties. The trial court denied the doctor's motion, granted the patient's motion, entered a judgment in favor of the patient as to liability, and then granted the doctor a stay

in order to appeal. The doctor, on appeal, argued that the patient lacked standing to pursue the claim against him because after the alleged malpractice, but before she filed the malpractice lawsuit, the patient filed for bankruptcy and failed to list the lawsuit as an asset of the estate. *Fields*, 96 Ark. App. at 175, 239 S.W.3d at 544.

In *Fields*, our court pointed out that:

> Congress, pursuant to the United States Constitution, Article 1, Section 8, established uniform laws on the subject of bankruptcy. The bankruptcy trustee is the primary person responsible for marshaling the assets of the bankrupt estate and for administering the claims and debts of the debtor. 11 U.S.C. § 541(a) (1994). The debtor has the duty to schedule assets and to cooperate with the trustee in the performance of his statutory duties. 11 U.S.C. § 521(1), (3) (1994). The estate encompasses all legal or equitable interest of the debtor in property as of commencement of the case. 11 U.S.C. § 541(a)(1).
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> All property of the estate remains in the estate and does not vest in the interest of the debtor unless: (1) after notice and hearing the trustee abandons the property; (2) the court orders abandonment of property that is burdensome to the estate or of inconsequential value and benefit; or (3) the property is scheduled as an asset and is not otherwise administered in the bankruptcy. 11 U.S.C. § 554(a)-(c) (1994). However, unscheduled assets never vest in the debtor and the property remains in the estate even after the bankruptcy case is closed for all other purposes. 11 U.S.C. § 554(d).
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> When a trustee is appointed to administer the property of the estate in bankruptcy, he has the exclusive right to prosecute causes of action that are the property of the bankrupt estate. 11 U.S.C. §§ 323(a)-(b), 704(1) (1994). Causes of action that accrue prior to the filing of a petition for relief under the Bankruptcy Act are property of the estate. *Bratton v. Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. 308, 788 S.W.2d 955 (1990). These claims include those that were filed by the debtor after discharge, as long as the cause of action had accrued prior to the filing of bankruptcy. *U.S. ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001). The cause of action must have been abandoned by the trustee in order for it to be pursued by the debtor. *Bratton*, *supra*.

Fields, 96 Ark. App. at 177–78, 239 S.W.3d at 545–46.

Based on the above cited law, the *Fields* court held that the alleged medical-malpractice claim accrued before the patient filed for bankruptcy relief, requiring her to disclose the claim to the trustee; the patient did not have standing to file the lawsuit, only the trustee did; and the patient did not petition the bankruptcy court to obtain an order abandoning the property. *Fields*, 96 Ark. App. at 179, 239 S.W.3d at 546. Thus, the *Fields* court held that the patient's complaint was void *ab initio*, and it was dismissed. *Id.* at 179, 239 S.W.3d at 547.

Other cases have similar holdings: *Bibbs v. Cmty. Bank*, 101 Ark. App. 462, ___ S.W.3d ___ (2008) (affirming trial court's grant of summary judgment of appellant's claim, holding that appellant lacked standing to prosecute the claim because it was property of bankruptcy estate); *Vickers v. Freyer*, 41 Ark. App. 122, 850 S.W.2d 10 (1993) (affirming dismissal of tortious interference claim—where claim arose prior to the filing of appellant's bankruptcy petition, the trustee was aware of the claim, and there was no order entered by the trustee abandoning the claim—because appellant lacked the standing to pursue the claim); *Bratton*, *supra* (affirming trial court's order dismissing appellant's complaint due to appellant's lack of standing; appellant had previously filed for bankruptcy, his cause of action was property of the bankruptcy estate, and there was no evidence that trustee had abandoned the claim or joined in or ratified the appellant's filing of the complaint).

In the instant case, the facts are undisputed that Cooper's medical-malpractice claim accrued prior to her filing for bankruptcy.[1] When she filed for bankruptcy, the malpractice

[1]Cooper admitted that her cause of action accrued no later than June 5, 2003. She further admitted that she filed for bankruptcy on June 9, 2004.

claim became part of her bankruptcy estate and only the trustee could prosecute the claim. *Bibbs*, *supra*; *Fields*, *supra*; *Vickers*, *supra*; *Bratton*, *supra*. Further, the record fails to reveal an order of the trustee abandoning the claim. Therefore, when Cooper filed the complaint against the appellees, she lacked the standing to do so, and her complaint is void *ab initio*. *Id*.

Cooper mistakenly relies upon *Lewis*, arguing that the trial court erred in granting appellees' motion for summary judgment because there is a genuine issue of material fact with regard to whether she had the intent to manipulate the judicial process to gain an unfair advantage. She contends that the facts demonstrate that she told her bankruptcy attorney about the cause of action and her bankruptcy attorney wrote a letter to the bankruptcy trustee advising him of the potential medical-malpractice claim.

In *Lewis*, the appellant, who was involved in a multi-vehicle accident, filed suit against the appellees alleging that their negligence caused the accident and his resulting injuries. Thereafter, the appellant filed a voluntary petition for bankruptcy, but failed to identify his lawsuit as a contingent or unliquidated claim. The appellees moved for summary judgment, and the trial court granted the motion and dismissed the appellant's complaint holding that appellant was judicially estopped by his bankruptcy proceeding from bringing his negligence suit. *Lewis*, 365 Ark. 331, 229 S.W.3d at 20. On appeal, the appellant argued that the trial court erred in granting the motion for summary judgment because there was a genuine issue of material fact with regard to whether he had the intent to manipulate the judicial process to gain an unfair advantage, which, in Arkansas, is an element of a prima facie case of judicial estoppel. *Id*. at 332, 229 S.W.3d at 21.

Our supreme court first stated that the purpose behind judicial estoppel is protection and preservation of the judicial process, that it is designed to prevent parties from "playing fast and loose with the courts," and it ensures a court's right "to rely on representations made in court." *Id.* at 333, 229 S.W.3d at 21.[2] The court then noted that the appellant conceded all of the elements of judicial estoppel except the element demonstrating the appellant's intent to manipulate the judicial process to gain an unfair advantage. *Id.* Finally, the court reversed the summary judgment, holding that, based on the appellant's testimony,[3] a jury could conclude that he had no intent to manipulate the judicial process. *Id.* at 334–35, 229 S.W.3d at 22–23.

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[2]The *Lewis* court also listed the elements of a prima facie case of judicial estoppel:

> 1. A party must assume a position clearly inconsistent with a position taken in an earlier case, or with a position taken in the same case;
> 2. A party must assume the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage;
> 3. A party must have successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; and
> 4. The integrity of the judicial process of at least one court must be impaired or injured by the inconsistent positions taken.

Lewis at 333, 229 S.W.3d at 21.

[3]The appellant testified that his negligence suit against appellees had nothing to do with his bankruptcy filing; only one medical bill related to the accident totaling $120 was discharged in bankruptcy, while his medical bills related to the accident were over $12,000; and he did inform either the trustee or the bankruptcy judge that he had a pending lawsuit.

In the case at bar, we hold that *Lewis* is not controlling authority. The issue on appeal in *Lewis* was the application of judicial estoppel—the issue in the instant case is standing. As such, it is of no relevance whether Cooper had the intent to manipulate the judicial process to gain an unfair advantage, whether she told the bankruptcy trustee about the potential medical-malpractice claim, or whether her bankruptcy attorney wrote a letter to the bankruptcy trustee advising him of the potential medical-malpractice claim. These are facts establishing elements specific to the determination of whether judicial estoppel applies. *Lewis*, 365 Ark. at 333, 229 S.W.3d at 20. Because judicial estoppel is not at issue in the case at bar, *Lewis* is not applicable.

Cooper's final argument, that because the bankruptcy trustee has reopened the bankruptcy case and can now "take whatever action with respect to Appellant that it feels is appropriate,"[4] also fails. The record contains no motion to substitute the bankruptcy trustee as the real party in interest. However, any such motion filed by Cooper would be well beyond the two-year medical-malpractice statute of limitations. *See Fields*, 96 Ark. App. at 176, 239 S.W.3d at 544 (holding that the trial court erred in granting the patient's motion to substitute the trustee as the real party in interest because two-year medical-malpractice statute of limitations had expired, noting that "a complaint filed by a party who did not have standing

[4]We interpret this argument to mean that now the bankruptcy trustee, the party with standing, has the option of prosecuting the medical-malpractice claim.

at the time the complaint was filed does not interrupt the statute of limitations, and motions to substitute the real party in interest are treated as the filing of a new suit").

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.